

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**CAESAR GONZALEZ**  
Claimant

VS.

**CLEARY BUILDING CORPORATION**  
Respondent

and

**ZURICH US INSURANCE COMPANY**  
Insurance Carrier

Docket No. 1,001,336

## ORDER

Respondent and its insurance carrier appeal from a preliminary hearing Order entered by Administrative Law Judge John D. Clark on February 5, 2002.

## Issues

The Administrative Law Judge (ALJ) awarded claimant preliminary hearing benefits consisting of medical treatment and payment of past medical expenses. On appeal respondent seeks review of the ALJ's findings that claimant's injury arose out of and in the course of his employment with the respondent and did not result from a willful failure to use a guard or protection against accident.

## **Findings of Fact and Conclusions of Law**

After reviewing the record and considering the arguments, the Appeals Board (Board) concludes the Order should be affirmed.

Respondent constructs pole barns. Claimant worked for respondent as a construction foreman. All employees are required to wear a safety harness when working six feet or more above ground. A safety harness is provided to each employee by the respondent.

Respondent contends that on November 1, 2001, while working on the roof of a pole barn, claimant was wearing a safety harness, but it was not properly secured utilizing a second rope. Furthermore, co-workers indicated even the single rope was not tied off at the time of claimant's fall.

Claimant disputes this. According to claimant, the co-workers were either not in a position to see him or were not paying attention to him before his fall. Furthermore, claimant testified, contrary to respondent's contention, that the custom and practice was to tie off with one rope, not two and that on the accident date the truck was equipped with only the shorter of the two ropes. Claimant further testified that even though he was tied off, his weight caused the wooden purlin he was tied to, to break. Because of this, claimant fell to the ground and was injured, despite his use of the safety harness.

The issues raised in this appeal turn primarily on the credibility of the witnesses testimony. If claimant is believed, his testimony supports a finding that he did not willfully fail to properly use the safety belt provided by respondent. While respondent offered transcripts of the recorded statements of two employees, neither actually saw claimant immediately before he fell. They both admitted that claimant was wearing the safety harness. The only inconsistency was whether the rope attached to claimant's safety harness was properly tied off.

Claimant explained the method he used to tie off his safety harness. He said he followed the procedure he was taught. The inconsistency concerning whether or not claimant was tied off was explained by claimant. The witnesses' descriptions of the accident are consistent with claimant's explanation. The ALJ obviously accepted claimant's explanation. The Board agrees with the ALJ's determination that claimant's testimony is credible and a compensable claim has been proven. In addition, if claimant was simply negligent in the way he used his safety equipment, as opposed to a willful failure to use the safety equipment, then the claim is also compensable.

**WHEREFORE** it is the finding, decision and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge John D. Clark on February 5, 2002, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this \_\_\_\_\_ day of May 2002.

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BOARD MEMBER

- c: Wade A. Dorothy, Attorney for Respondent and Insurance Carrier  
Phillip R. Fields, Attorney for Claimant  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director